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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G039908
v.	(Super. Ct. No. 06NF3301)
IGNACIO PADILLA, JR.,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

John L. Dodds, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

After defendant Ignacio Padilla pleaded guilty to misdemeanor possession of a firearm (Pen. Code, § 12031, subds. (a)(1), (a)(2)(g); all further statutory references are to this code unless otherwise indicated), a jury convicted him of two counts of second

degree robbery (§§ 211, 212.5) and found true he personally used a firearm during each offense (§§ 12022.53, subd. (b), 12022.5, subd. (a).) The court sentenced him to 17 years and 4 months in state prison, consisting of the middle terms for both robbery counts, plus 10 years, 40 months for the gun use enhancements on each count.

Defendant contends the trial court erred in consolidating his two robbery counts and violated his constitutional right to confrontation by admitting his former codefendant's guilty plea into evidence. We find no prejudicial error and affirm.

FACTS

Around 9:00 p.m. one night in May 2006 three men entered Porky's Pizza in Yorba Linda and walked around the counter. One of the men had a shotgun. Another man asked where the money was and ordered Craig Schneider and another employee to the floor. One man took Schneider's money and wallet and another took money from the cash register. After the men left, Schneider called 911. A surveillance camera captured the robbery.

A month later, three men entered Domino's Pizza in Anaheim around 10:30 p.m. One of the men, later identified as Adam Prince, walked around the counter and told employee Brandon Roberts not to move. Another man, later identified as defendant, was holding a duffel bag with a shotgun sticking out of it. Prince began taking money out of the register, which contained only a few dollars. When asked for more money, Roberts stated he could not access the safe but gave them about $900 from his pocket that he had taken from the register and had planned to drop in the safe. Two of the men forced him into the walk-in freezer and shut the door. Another employee returned shortly and opened the door, at which time they called the police.

Defendant's girlfriend, Denell Peruzzi (because the case involves several witnesses with the last name of Peruzzi, we refer to them by their first names to avoid

confusion and intend no disrespect), who was pregnant with his child, lived with her grandmother, Mary Bodnar, between February and June 2006. Defendant visited often and kept items there.

In April, Bodnar found a "rifle-type thing" in a case in her backyard next to Denell's bedroom and told Denell. Defendant stated it was only a pellet or BB gun and took it. Bodnar subsequently informed police about finding the gun bag with a rifle inside. Two months later, Bodnar's housekeeper found a wallet and a green money bag in Denell's bedroom. The wallet belonged to Schneider.

While investigating the Domino's robbery, police officer Eric Grisotti spoke to Denell's sister, Samantha Peruzzi, at the home of their mother, Denise Peruzzi; where Denell lived after June 2006. Samantha provided him with "a name" and a partial birth date, plus showed him a photograph on her computer. The photograph was the same person depicted in the sheriff's department special bulletin regarding the robberies.

Roberts picked defendant's photograph out of a six-pack photographic lineup and identified him in court as the person with the weapon during the robbery. He also identified Prince from another photographic lineup as the "main guy" in the robbery who stood next to him behind the counter.

Detective Frank Nin also interviewed Samantha during his investigation of the Porky's Pizza robbery. When he showed her the photo stills from the surveillance video, Samantha identified defendant as one of the robbers, stating she was "absolutely positive." She told Nin that defendant had told her he was able to support her pregnant sister by robbing pizza restaurants, including Porky's and Pizza Huts, while armed with an unloaded gun. On one occasion, she heard defendant say, "We hit a Pizza Hut, we did a job last night" to support Denell. Samantha also told Nin that defendant had pulled a gun bag containing a shotgun from underneath Denell's bed at Denise's house and showed it to her and that her grandmother had found a shotgun in her backyard.

Denell told the police defendant had given her $500 on three occasions despite not having a job. When shown a photograph from the special bulletin regarding the robberies, she identified defendant as the person holding the bag and shotgun. She also stated she had seen defendant with a shotgun or rifle-type weapon, which he kept under her bed. The police searched Denise's house and found shotgun rounds in a pile of clothing and other items belonging to Denell and defendant.

DISCUSSION

1. Denial of Motion to Sever

Defendant contends the trial court erred in denying his pretrial motion to sever the robbery counts. The court denied the motion on the ground that although the identification in count 2 was "a little bit weaker," neither count involved "perfect identifications." Additionally, the fact both crimes involved similar crime partners at pizza restaurants constituted "pattern evidence" and made the crimes "unique." We find no error.

Section 954 authorizes a consolidation or joinder of charges made in two or more accusatory pleadings where the pleadings "charge two or more different offenses . . . of the same class of crimes or offenses, under separate counts . . . ." The law generally favors consolidation because it promotes efficiency. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) We review a ruling on consolidation for abuse of discretion based on "'the information available to the court at the time the motion is heard' [citation.]" (*ibid*.) . . . [to] determine whether the ruling falls "'outside the bounds of reason.' [Citation.]" (*Id*. at p. 408.) Even if the trial court errs in consolidating charges or denying a subsequent motion to sever, reversal is not required unless the defendant can show that it is reasonably probable the joinder affected the verdicts. (*People v. Grant* (2003) 113 Cal.App.4th 579, 587-588.)

Crimes are of the "same class" for section 954 purposes if they possess some common characteristics or attributes. (See generally *People v. Grant*, *supra*, 113 Cal.App.4th at pp. 586-587.) Defendant does not dispute the robberies are of the same class and thus the threshold requirement for consolidation was met here.

Where the statutory criteria are satisfied, a consolidation of charges is inappropriate only where there is a "clear showing" that doing so would result in a level of prejudice to the defendant that outweighs its benefits. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 409.) Under this standard, the issue of whether the trial court abused its discretion in consolidating separate charges or denying a motion to sever such charges turns on the particular circumstances of each case. (*People v. Marshall* (1997) 15 Cal.4th 1, 27-28.) The relevant factors to consider in resolving this issue are whether: (1) the evidence of the crimes would have been cross-admissible in separate trials; (2) some of the charges would have been unusually likely to inflame the jury against the defendant; (3) the prosecution sought to join a weak case with a strong case or another weak case, such that the total evidence on the joined charges might have changed the outcome of the trial on some or all of the charged offenses; and (4) any of the charges was a death penalty offense or would have converted the matter into a capital case. (*Ibid*.)

The applicable factors for determining prejudice are not "equally significant" because a conclusion that the evidence of the charges would be cross-admissible in separate trials would dispel the possibility of any significant prejudice. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.) Accordingly, we consider this factor first.

Defendant contends that the court abused its discretion in allowing the charges to proceed on a consolidated basis because the evidence relating to each robbery would not have been cross-admissible. The contention lacks merit.

Although evidence of a defendant's character or prior bad acts is generally inadmissible to prove his conduct on a particular occasion, such evidence is admissible to

prove some other relevant fact, such as identity, motive, intent, preparation or planning. (Evid. Code, § 1101.) "To be relevant to prove identity, the uncharged crime must be highly similar to the charged offenses, while a lesser degree of similarity is required to establish relevance to prove common design or plan, and the least similarity is required to establish relevance to prove intent. [Citations.]" (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

Here, both robberies were of pizza restaurants occurring at almost the same time at night one month apart and involved three men, one of whom was armed with a rifle or shotgun and another who walked behind the counter where the employee was working and demanded money. The evidence is sufficiently similar to show common design or plan and thus it is unnecessary to also determine whether, as defendant contends, it was insufficient to establish identity. Because the evidence would have been cross-admissible in separate trials, the court did not err in denying defendant's motion to sever.

2. Constitutional Right to Confrontation

Prior to trial, the prosecutor moved to admit Prince's guilty plea to "bolster" Roberts' identification of defendant by showing Roberts had correctly identified Prince as a person involved in the Domino's robbery. He specifically requested the court take judicial notice of the *In re Tahl* (1969) 1 Cal.3d 122, 132 form for the conviction, plus the factual basis for the plea, explaining that it was not hearsay because the evidence would be admitted "for purposes of identification only." The court ruled the *Tahl* form and the factual basis for the plea could be admitted but excluded any reference to Prince committing the robbery with two other people and while armed.

At the close of evidence, the court took judicial of its records and "note[d] that according to these official court records, a person by the name of . . . Prince . . . entered a plea of guilty to one count of violation of section 211 . . ., robbery . . . . [¶] And that while he was entering this plea, he was represented by counsel and that during the course of him pleading guilty, he submitted a document from him which he initialed as follows: 'I offer the following facts as the basis for my guilty plea: In Orange County, California, on June 4th of 2006, I entered a Domino's Pizza restaurant located . . . in Anaheim, and took the personal property of Domino's and . . . Roberts by force and fear and from their possession and immediate presence and against their will.'" The jury was later instructed it could consider Prince's guilty plea only for the limited purpose of "the issue of the accuracy of the identification of the defendant by . . . Roberts."

Defendant argues the admission of Prince's guilty plea violated his right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*), which held that the confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Id.* at pp. 53-54.) Defendant asserts he never had an opportunity to cross-examine Prince because the latter's counsel represented his client intended to invoke the Fifth Amendment if called to testify at defendant's trial. The Attorney General agrees this "does appear to have been in violation of *Crawford*[,]" but argues the error was harmless. Although we are not convinced *Crawford* error occurred, we agree no prejudice occurred even if it did.

Crawford declined to provide a comprehensive definition of "testimonial" evidence (*Crawford*, *supra*, 541 U.S. at p. 68) but concluded it "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid.*) Defendant does not contend Prince's guilty plea falls within any of these categories.

The Supreme Court in *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266, 165 L.Ed.2d 224] (*Davis*) considered whether a caller's initial statement and subsequent responses to the questions of a 911 operator qualified as a testimonial statement. In concluding it did not (*id*. at p. 827), it held "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822, fn. omitted.)

Regarding the latter, the court stated the "product of [police] interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial[]" because "[i]t is, in the terms of the 1828 American dictionary quoted in *Crawford*, '"[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."' [Citations.]" (*Davis, supra*, 547 U.S. at p. 826.) Seizing upon the last phrase, defendant asserts "Prince's attestation as to the factual basis for his guilty plea, sworn under penalty of perjury before a criminal court, is well within [*Davis*'s] definition of 'testimonial.'" On the contrary, the factual basis of Prince's guilty plea was not admitted to prove the underlying facts, i.e., that he robbed Roberts and the Domino's, but rather to bolster Roberts' identification. Therefore it was not testimonial under defendant's definition.

In *People v. Taulton* (2005) 129 Cal.App.4th 1218 (*Taulton*), this court held that "records of prior convictions are not 'testimonial'" and thus not subject to *Crawford*'s confrontation requirements. (*Id*. at p. 1221.) We determined "*Crawford* supports a conclusion that the test for determining whether a statement is 'testimonial' is not whether its use in a potential trial is foreseeable, but whether it was obtained for the purpose of potentially using it in a criminal trial or determining if a criminal charge

should issue." (*Id*. at p. 1224.) Noting that *Crawford* had specifically mentioned business records were not "'testimonial'" (*ibid*.), we found "[a] similar analysis should be applied to official records[]" (*ibid*.).

Defendant acknowledges *Taulton* but contends the following paragraph mandates a different result in this case: "Most [official records] are like business records in that they are prepared to provide a chronicle of some act or event relating to the public employee's duty. Nevertheless, here we cannot draw a line as bright as that pertaining to business records. Some public records, particularly police records of interrogations, would clearly fit the definition of 'testimonial statements,' as they are produced to be used in a potential criminal trial or to determine whether criminal charges should issue. But to the extent that public records are not prepared for this purpose, they are subject to the same analysis as business records and would not constitute 'testimonial statements.' Records referenced in . . . section 969b fall into the latter category." (*Taulton*, *supra*, 129 Cal.App.4th at p. 1225.)

According to defendant, although the plea was "memorialized in a public record, Prince's confession, like police interrogations, was 'produced to be used in a potential criminal trial or to determine whether criminal charges should issue.'" We rejected a similar contention in *Taulton*, concluding that prior conviction records "are prepared to document acts and events relating to convictions and imprisonments. Although they may ultimately be used in criminal proceedings, as the documents were here, they were not prepared for the purpose of providing evidence in criminal trials or for determining whether criminal charges should issue. Therefore, these records are beyond the scope of *Crawford* . . . ." (*Taulton*, *supra*, 129 Cal.App.4th at p. 1225.)

Here, the record of Prince's guilty plea was likewise beyond *Crawford*'s scope, as it was not prepared for the purposes of either determining whether criminal charges should be filed against Price or providing evidence in a criminal trial despite the fact that is what ultimately occurred. Rather, these are nontestimonial records not subject

to *Crawford*'s confrontation and cross-examination requirements. (See *Taulton*, *supra*, 129 Cal.App.4th at pp. 1221-1225.)

The statements in Prince's guilty plea were also not testimonial because they did not incriminate defendant. Prince's plea inculpated only himself and made no mention of defendant or an accomplice. Further, it was offered for a nonhearsay purpose, i.e., to bolster Roberts' identification of defendant. The plea was relevant for that purpose regardless and even if the plea did not accurately reflect Prince's involvement in the robbery as defendant suggests, it tended to prove, along with other evidence, Roberts correctly identified defendant as one of the robbers. "Because [the] statements were admitted for a nonhearsay purpose, their admission did not . . . violate the confrontation clause of the Sixth Amendment of the federal Constitution. 'The Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 706, 707, fn. 18, quoting from *Crawford*, *supra*, 541 U.S. at p. 59, fn. 9 [victim's identification of the defendant in photographic lineup did not violate *Crawford* because relevant for nonhearsay purpose of establishing the defendant's motive for killing him was to eliminate him as a witness and was relevant regardless of accuracy of identification].)

The authorities cited by defendant do not persuade us otherwise. *United States v. McClain* (2d Cir. 2004) 377 F.3d 219 held that "a plea allocution constitutes testimony, as it is formally given in court, under oath, and in response to questions by the court or the prosecutor. [Citation.] Therefore, a plea allocution by a co-conspirator who does not testify at trial may not be introduced as substantive evidence against a defendant unless the co-conspirator is unavailable and there has been a prior opportunity for cross-examination. [Citation.]" (*Id*. at pp. 221-222.) *United States v. Reifler* (2d Cir. 2006) 446 F.3d 65, 87 and *United States v. Hardwick* (2d Cir. 2008) 523 F.3d 94, 98 are to the same effect.

The present case does not involve a plea allocution and the guilty plea was not being "introduced as substantive evidence against" defendant but only to bolster Roberts' identification. The latter fact distinguishes this case from *United States. v. Rodriguez-Marrero* (1st Cir. 2004) 390 F.3d 1, 17 and *State v. Watt* (2007) 160 Wash.2d 626, 628 [160 P.3d 640] in which the hearsay statements were offered as substantive evidence against the defendant. Nor does it involve sworn confessions to police as in *State v. Nguyen* (2006) 281 Kan. 702, 715 [133 P.3d 1259] and *United States. v. Rodriguez-Marrero, supra*, 390 F.3d 1, or an excited utterance, which was found not testimonial in *State v. Wilkinson* (2005) 178 Vt. 174, 178 [879 A.2d 445].

Finally, even assuming error occurred in admitting evidence of Prince's guilty plea it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]; see *People v. Geier* (2007) 41 Cal.4th 555, 608 ["Confrontation clause violations are subject to federal harmless-error analysis under *Chapman*"].) The factual basis for the plea was relevant only to bolster Roberts' credibility in his identification of defendant. The plea contained no reference to accomplices or coconspirators and thus did not implicate defendant either directly or indirectly. The jury was instructed the plea could only be considered "on the issue of the accuracy of the identification of the defendant by . . . Roberts." We presume the jury followed this instruction. (*People v. Young* (2005) 34 Cal.4th 1149, 1214.)

Moreover, as the Attorney General notes, evidence of defendant's guilt on the Domino's charge was strong. Roberts identified him as the person carrying the shotgun in both a photographic lineup and in court. Defendant admitted to robbing pizza restaurants to support his pregnant girlfriend Denell and provided her with $500 on three occasions despite being unemployed. Both Denell and her sister Samantha had seen defendant with a shotgun or rifle-type weapon, which he kept under the Denell's bed at her Denise's house, and the police found shotgun rounds in a pile of clothing belonging to defendant and Denell.

We reject defendant's characterization of Roberts' identification of him as "questionable at best" because "at first, he had told police that he would be unable to identify the second or the third of the three robbers." Roberts may have doubted his ability immediately after the robbery when talking to police but the record contains no indication he had any hesitation at picking defendant out of the photographic array or at trial. In fact, he testified he had "no doubt" in his mind defendant was the one with the gun that night. Moreover, although defendant is correct Domino's was never mentioned in the "hearsay testimony to the effect that [he] claimed to have robbed pizza stores," that proves nothing particularly since the witness specifically testified to not being able to "recall if there were any others."

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.